

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAMIE T. LAIR

Petitioner,

NO. CV-11-131-RMP

VS.

SCOTT FRAKES,

Respondent.

ORDER DISMISSING HABEAS PETITION

BEFORE THE COURT is Petitioner's document titled, "Show Cause Rebuttal"

Brief, In Re Dismissal as Time-Barred Being Challenged as Inappropriate” (ECF No. 12) which the court construes as Petitioner’s Response to the Order to Show Cause (ECF No. 10). Petitioner, a prisoner at the Monroe Correctional Complex - Twin Rivers Unit, is proceeding *pro se* and *in forma pauperis* *pro se*; Respondent has not been served.

Mr. Lair pleaded guilty to First Degree Incest in Spokane County and was sentenced on January 17, 2007. He asserts a Correctional Records Specialist at the Airway Heights Correctional Complex conducted a routine correctional records review and audit on May 18, 2007, and noticed “a statutory application mistake, where the State and the Court placed Petitioner under an offender category where the history of Petitioner’s criminal past, does not meet the defined criteria.” Petitioner asserts letters were sent to the Court and the Prosecutor’s office, but claims “no valid responses supporting the issue” were received. He asserts the Indeterminate Sentence Review Board ruled on October 23, 2007, based on the Correctional Records Specialist’s

1 assessment, that "more stringent conditions as a requisite to earning release" were not
2 required.

3 Mr. Lair appears to assert this "statutory application mistake" discovered by a
4 Correctional Records Specialist on May 18, 2007, constitutes the factual basis for
5 Petitioner's claim which could not have been known to him through "due diligence"
6 under 28 U.S.C. § 2244(d)(1)(D), and should re-start the limitations period. Assuming,
7 without deciding, that the limitations period began to run on May 19, 2007, the day after
8 this alleged discovery, Mr. Lair admits in his habeas petition, he did not attempt to
9 submit Motions to modify and correct his judgment and sentence under CrR 7.8, until
10 May 2008. His "Response" to the Order to Show Cause provides no clarifying
11 information regarding any earlier submitted motions challenging his judgment and
12 sentence, or any filing dates.

13 Giving Mr. Lair every benefit of the doubt and assuming, without deciding, he
14 "properly filed" a motion in a state court on May 1, 2008, 347 days of the limitations
15 period would have already expired on that date. Mr. Lair would have only 18 days after
16 the state courts concluded review of his motion to file a federal habeas corpus petition.

17 Petitioner states the motion was transferred to the Court of Appeals as a Personal
18 Restraint Petition, cause number 27565-5-III, and denied on July 29, 2009. Petitioner
19 indicates he sought review by the Washington State Supreme Court, and his Motion to
20 Modify Commissioner's Ruling was denied on February 4, 2010. It is the decision of the
21 state appellate court, rather than the ministerial act of entry of the mandate, that signals
22 the conclusion of review. *See Wixom v. Washington*, 264 F.3d 894, 897-98 (9th
23 Cir.2001). Therefore, on February 4, 2010, when the Washington State Supreme Court
24 concluded review of his motion/Personal Restraint Petition, only 18 days of the
25 limitations period remained. Consequently, Mr. Lair had until February 22, 2010, to file
26 his federal habeas corpus petition. He did not do so.

27 The fact Mr. Lair claims he then researched, prepared and filed a "Motion to
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1 Recall Mandate” either on August 30, 2010, or September 14, 2010, would not toll the
 2 limitations period which had already expired in February 2010. *See Ferguson v.*
 3 *Palmateer*, 321 F.3d 820, 823 (9th Cir.2003)(“section 2244(d) does not permit the
 4 reinitiation of the limitations period that has ended before the state petition was filed”).
 5 Petitioner admits he did not file a direct appeal of his conviction. He specifically states
 6 he is not challenging his conviction. Rather, he is challenging the inclusion of a 1985
 7 “Juvenile Disposition” of his criminal history in the calculation of his offender score.

8 “[A] petitioner is entitled to equitable tolling only if he shows (1) that he has been
 9 pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his
 10 way and prevented timely filing.” *Holland v. Florida*, — U.S. —, —, 130 S.Ct.
 11 2549, 2562, 177 L.Ed.2d 130 (2010) (internal quotation marks omitted). Petitioner must
 12 show that some “external force” caused his untimeliness, rather than mere “oversight,
 13 miscalculation or negligence.” *Waldron–Ramsey v. Pacholke*, 556 F.3d 1008, 1011 (9th
 14 Cir. 2009) (internal quotation marks omitted). In other words, Petitioner must have been
 15 delayed by circumstances “beyond [his] direct control,” and not by his or his counsel’s
 16 “own mistake.” *Harris v. Carter*, 515 F.3d 1051, 1055 (9th Cir. 2008).

17 Petitioner asserts, based on the “time-line” and arguments he presented, that he has
 18 diligently pursued his rights. Petitioner, however, fails to account for the time lapse
 19 between the discovery of the allegedly improper application of a state statute in May
 20 2007, until he avers he began filing a series of Motions under CrR 7.8 (which he claims
 21 the state court lost) in May 2008. Petitioner does not account for his failure to file a
 22 federal habeas petition between February 4, 2010, and February 22, 2010. The court
 23 cannot infer from the allegations presented that Mr. Lair diligently pursued his rights.

24 In addition, his proffer of “external circumstances,” (i.e., that he was not informed
 25 of the application of RCW 9.94A.712 by trial counsel, the sentencing judge, persons at
 26 his initial DOC facility, or classification hearing staff) does not show he was prevented
 27 from timely filing after that discovery. Indeed, even if this court concedes the running of
 28 ORDER DISMISSING HABEAS PETITION-- 3

1 the limitations period was delayed under 28 U.S.C. § 2244(d)(1)(D) as stated above,
2 Petitioner does not account for the delays between May 2007 and May 2008, and again
3 in February 2010.

4 After review of Mr. Lair's submissions and the record as a whole, the court finds
5 he has failed to demonstrate an equitable basis to toll the running of the limitations
6 period in this action which expired, at the latest, on February 22, 2010. His federal
7 habeas petition, signed March 30, 2011, is time-barred under 28 U.S.C. § 2244(d).
8 Accordingly, **IT IS ORDERED** the Petition (ECF No. 1) is **DISMISSED with**
9 **prejudice.**

10 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
11 Order, enter judgement, and forward copies to Petitioner. The court further certifies that
12 pursuant to 28 U.S.C. § 1915(a)(3), an appeal from this decision could not be taken in
13 good faith, and there is no basis upon which to issue a certificate of appealability. 28
14 U.S.C. § 2253(c); Fed. R.App. P. 22(b).

15 **DATED** this 8th day of July 2011.

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18 *s/ Rosanna Malouf Peterson*
19 ROSANNA MALOUF PETERSON
20 CHIEF UNITED STATES DISTRICT JUDGE
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